

ROUTING AND TRANSMITTAL SLIP

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
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Action	File	Note and Return
Approval	For Clearance	Per Conversation
As Requested	For Correction	Prepare Reply
Circulate	For Your Information	See Me
Comment	Investigate	Signature
Coordination	Justify	

REMARKS

FOCI Policy

Aug 81 - Sept 83

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
	Phone No.

5041-102

* U.S.G.P.O.: 1983-421-529/320

OPTIONAL FORM 41 (Rev. 7-76)
 Prescribed by GSA
 FPMR (41 CFR) 101-11.206

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OFFICE OF THE DEPUTY UNDER SECRETARY OF
DEFENSE FOR POLICY

30 AUG 1983

Memo for

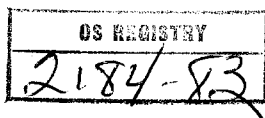
Bill:

As promised, attached is a copy of the new DoD policy dealing with foreign ownership, control or influence about which General Stilwell spoke at the 22 August meeting of the IG/CM. Please let me know if you have any questions regarding this new policy.

Maynard
Maynard C. Anderson
Director

Security Plans and Programs

Attachment



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Date

6 SEP 1983

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* GPO : 1981 O - 363-529 (148)

PART 2. U.S. FACILITIES THAT ARE FOREIGN OWNED, CONTROLLED^{cell}
OR INFLUENCED

2-200. Application. This Part establishes the policy concerning the clearance of facilities under foreign ownership, control or influence (FOCI); provides criteria to be considered for determining whether facilities located in the United States, Puerto Rico, and U.S. possessions or trust territories are under FOCI; prescribes procedures for the clearance of facilities determined to be under FOCI; and outlines responsibilities in FOCI matters.

2-201. General Policy.

a. A facility will be considered under FOCI when a reasonable basis exists to conclude that the nature and extent of foreign ownership, control or influence is such that foreign dominance over the management or operations of the facility may result in the compromise of classified information or impact adversely the performance on classified contracts.

b. A facility that is owned, controlled or influenced by a foreign national or a commercial or governmental entity from a communist country or a country overtly hostile to the United States shall not be eligible for a facility security clearance.

c. A facility that is owned, controlled or influenced by foreign interests other than those included in b above, may be eligible for a facility security clearance provided action

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can be taken to effectively negate or reduce associated FOCI risks to an acceptable level.

2-202 Factors. The following factors will be considered in determining whether a business entity is under FOCI:

- a. Foreign interest ownership or beneficial ownership of five percent or more of the organization's securities;
- b. Ownership of any foreign interest in whole or in part;
- c. Management positions held by foreign interests such as directors, officers or executive personnel;
- d. Foreign interests control or influence or are in a position to control or influence the election, appointment, or tenure of directors, officers, or executive personnel of the organization;
- e. Contracts, agreements, understandings or arrangements with foreign interest(s);
- f. Indebtedness to foreign interests;
- g. Any income derived from Communist countries, or countries overtly hostile to the U.S., or income in excess of 10 percent of gross income from other foreign interests;
- h. Five percent or more of any class of the entity's securities are held in "nominee shares" in "street names" or in some other method which does not disclose the beneficial owner of equitable title;
- i. Interlocking directors with foreign interests; or
- j. Any other factor that indicates or demonstrates a

capability on the part of foreign interests to control or influence the operations or management of the business organization concerned.

2-203 Procedures.

a. If any of the factors outlined in paragraph 2-202 are present, the cognizant security office shall review the case to determine the relative significance of each factor in assessing the firm's initial or continued eligibility for a facility security clearance. The cognizant security office may be delegated authority to grant or continue a facility security clearance where one or more of the following circumstances are present, provided there is a favorable finding by the Director of Industrial Security:

(1) Interlocking directorates involving firms located in non-Communist countries, provided that a General Security of Information Agreement exists with the country involved.

(2) If licensing, patent, sales or trade secret agreements exist or are entered into with any foreign interest, including a subsidiary of the contractor, and the contractor's Standard Practice Procedures includes adequate provisions to insure that representatives of the foreign interest who are parties to such agreements shall be effectively denied access to all classified records, information, and material and to controlled areas. In all such cases the contractor shall be informed of the obligation to comply with the State Department's ITAR (reference (i)) as it pertains to such agreements with foreign interests.

(3) If income from Communist countries does not exceed 5 percent of gross income, and income from other countries does not exceed 20 percent of gross income.

(4) If the contractor has ownership in foreign subsidiaries or affiliates which are located in non-Communist countries.

(5) If information disclosed regarding securities held in "nominee shares" and "street names" reveals no indication of foreign beneficial ownership.

(6) If indebtedness to foreign interests does not exceed 5 percent of current assets.

b. If the cognizant security office determines that the firm may be ineligible for a facility security clearance or that additional action would be necessary to nullify or negate the effects of FOCI, the firm shall be promptly advised and requested to submit a plan of action to preclude foreign interests from access to classified information. Assistance shall be provided to the facility in formulating such a plan in accordance with 2-204. In addition, management shall be advised that failure to submit the requested plan within the prescribed period of time will result in termination of facility security clearance processing action or initiation of action to revoke an existing facility security clearance, as applicable.

c. Whenever the cognizant security office is unable to resolve the FOCI factors present or has not been delegated authority to grant or continue a facility security clearance as provided for in paragraph a., above, the facility case file shall be referred to the Director, DIS, ATTN: Deputy Director (Industrial Security) for determination as to eligibility for a facility security clearance. The facility case file shall be documented to set forth the FOCI factors present, as well as the facility's proposed plan of action¹ to effectively reduce associated FOCI risks to an acceptable level. The case file shall also contain the cognizant security office's evaluation and recommendation, and as appropriate, an opinion of legal counsel. If legal advice is required to process the case, the Director of Industrial Security should consult with the Office of Counsel of the DCASR servicing the area. Cases in which a foreign interest has acquired a majority of the voting stock of a cleared U.S. firm will be reported immediately to the Director, DIS, ATTN; Deputy Director (Industrial Security), concurrent with invalidation of the facility clearance in accordance with paragraph 2-118k.

¹ A facility's proposed plan of action may consist of one of the methods prescribed by 2-205, below, or any combination thereof, as appropriate. It may also consist of measures which provide for the physical or organizational separation of the facility component performing the classified work; modification or termination of agreements with foreign interests; diversification or reduction of foreign source income; assignment of specific security duties and responsibilities to Board members; formulation of special executive-level security committees to consider and oversee classified matters; and other actions to negate or reduce FOCI to acceptable levels.

d. Upon receipt of a referral from the cognizant security office, the Director, DIS will cause a review to be made of the case. If, after such review, it is determined that unacceptable risk associated with foreign ownership, control or influence is present, and that the facility's proposed plan to negate or eliminate such risk is inadequate, the Director, DIS shall advise the facility, through the cognizant security office, of the measures required to become eligible for a facility security clearance. The facility shall be advised that failure to adopt the recommended or other acceptable measures shall preclude final determination of the facility's eligibility for a facility security clearance and will result in denial or revocation of the facility security clearance. If, however, the facility's proposed plan is viewed as adequate by the Director, DIS, or the modifications suggested by DIS are subsequently accepted by the facility, the Director, DIS shall determine the facility to be eligible for a facility security clearance.

e. In the event of an adverse determination by the Director, DIS, the facility shall be advised that the decision may be appealed in writing to the Deputy Under Secretary of Defense (Policy), ATTN; Director, Security Plans and Programs, whose decision in such matters shall be final.

2-204. Assistance. Whenever requested by the facility, or on receipt of the report required by paragraph 6a(4) (f) ISM, the cognizant security office or the Deputy Director (Industrial

Security), HQ DIS, will provide the facility, in writing, the DoD policy regarding FOCI and will consult with the facility as needed to provide additional advice and guidance regarding the facility's proposed action plan. Documents relating to these discussions and reports made pursuant to the foregoing are presumptively proprietary when appropriately designated by the facility and shall be protected from unauthorized disclosure and handled on a strict need-to-know basis. When such reports are submitted in confidence, exemptions to DoD Directive 5400.7 (reference (1)), to the extent applicable, shall be invoked to withhold them from public disclosure. Such reports shall be marked "FOR OFFICIAL USE ONLY".

2-205 Methods to Negate or Reduce Risk in Foreign Ownership Cases. Under normal circumstances, foreign ownership of a U.S. firm under consideration for a facility security clearance becomes a concern to the Department of Defense when the amount of foreign owned stock is at least sufficient to elect representation to the U.S. firm's Board of Directors or foreign interests are otherwise in a position to select such representatives (equivalent equity for unincorporated business enterprises). Foreign ownership which cannot be so manifested is not, in and of itself, considered significant and, therefore, shall not be considered

as the sole criteria for processing under this paragraph.²

a. Board Resolution. When the amount of stock owned by the foreign interest is sufficient to elect representation to the Board or an agreement exists whereby the foreign interest is permitted representation on the Board, the effects of foreign ownership will ordinarily be mitigated by a resolution of the Board of Directors whereby the cleared firm recognizes the elements of FOCI and acknowledges its continuing obligations under the DoD Security Agreement (DD Form 441). The resolution must identify the foreign shareholders and their representatives, if any, and note the extent of foreign ownership, to include a certification that the foreign shareholders and their representatives shall not require, shall not have, and can be effectively excluded from access to all classified information in the possession of the cleared facility and will not be permitted to occupy positions that would enable them to influence the organization's policies and practices in the performance of classified contracts. Copies

² Instances involving less significant foreign stockholdings are analyzed to assess source and to determine possible significance when considered in conjunction with other aspects of foreign involvement which may be present in a particular case.

of such resolutions shall be furnished to all board members and principal management officials. In addition, the substance of the foregoing resolutions shall be brought to the attention of all cleared personnel by publication in the firm's standard practice procedures. Moreover, an annual certification shall be provided to the cognizant security office acknowledging the continued effectiveness of the resolutions. Compliance with the resolutions should be verified during periodic security inspections. There are circumstances when it may become necessary for the Board of Directors to adopt further resolutions and take additional administrative actions in order to assure the Government that the existing facility security clearance remains clearly consistent with the national interest. The following criteria must also be satisfied in order for a Board Resolution to be utilized as the sole method required to negate or effectively reduce the risk of compromise arising from foreign ownership within the levels prescribed herein.

(1) U.S. interests can be identified as owning a majority of the stock and the nature and distribution of the minority stockholdings and the composition and structure of management do not permit foreign interests to control or dominate the business management of the U.S. firm; and

(2) The Chairman and Chief Executive Officer of the U.S. firm are United States citizens;

b. Voting Trust Agreement. A Voting Trust Agreement is an acceptable method to eliminate risks associated with foreign ownership when a foreign interest owns a majority of the voting securities of the U.S. firm or, if less than 51 percent foreign owned, it can be reasonably determined that the foreign shareholder or his representative(s) is in a position to effectively control or have the dominant influence over the business management of the U.S. firm. Under this arrangement, the foreign stockholder(s) must transfer legal title of foreign-owned stock to the Trustees. The Voting Trust arrangement must unequivocally provide for the exercise of all prerogatives of ownership by the Trustees with complete freedom to act independently without consultation with, interference by or influence from foreign stockholders. Except, however, the trust agreement may limit the authority of the Trustees by requiring that approval be obtained from the foreign stockholder(s) with respect to: (i) the sale or disposal of the corporation's assets or a substantial part thereof; (ii) pledges, mortgages or other encumbrances on the capital stock which they hold in trust; (iii) corporate mergers, consolidations, or reorganization; (iv) the dissolution of the corporation; and (v) the filing of a bankruptcy petition. The Trustees must assume full responsibility for the voting stock and for exercising all management prerogatives relating thereto in such a way as to ensure that the foreign stockholders, except for the approvals just enumerated, will be effectively insulated from the cleared facility and continue solely in the

status of beneficiaries. The facility must be organized, structured and financed so as to be capable of operating as a viable business entity independent from the foreign stockholders. The Certification and Visitation provisions of paragraph 2-206 and 2-207 are required under this arrangement. There shall be three trustees, and at least one must become a member of the Board of Directors. In addition, Trustees must:

(1) Be responsible U.S. citizens residing within the United States, and be capable of assuming full responsibility for voting the stock and exercising the management prerogatives relating thereto in such a way as to ensure that the foreign stockholders will be effectively insulated from the cleared facility.

(2) Be completely disinterested individuals with no prior involvement with either the facility or the corporate body in which it is located, or the foreign interest.

(3) Be eligible for and issued a personnel security clearance to the level of the facility security clearance. When a vacancy occurs, a successor Trustee shall be appointed by the remaining Trustees. Prior to being accepted as Trustees by the Director, DIS, the Trustees must be advised in writing by the cognizant security office of the duties and responsibilities they are undertaking on behalf of the U.S. Government to insulate the cleared facility from the foreign interests. Moreover, the Trustees must indicate, in writing, their willingness to accept this responsibility.

c. Proxy Agreement. Under this arrangement, the voting rights of stock owned by foreign interests are conveyed to the

Proxy Holders by means of an irrevocable Proxy agreement. Legal title to the stock remains with the foreign interests. All other provisions of the Voting Trust as applies to Trustees and the terms of the agreement shall apply to the Proxy Holders in the case of a Proxy Agreement. Conditions for consideration of use are the same as required for the above.

d. Reciprocal Clearance. The Department of Defense has entered into Reciprocal Industrial Security Agreements with certain of its allies. These agreements establish arrangements whereby a contractor facility located in either signatory country, which is under the ownership, control or influence of an entity from the other country may be declared eligible for access to classified information. This arrangement also provides for the clearing of foreign nationals who occupy a position required to be cleared in connection with the issuance of a facility security clearance. Facility security clearance action is based on the receipt of an assurance from the government of the country from which the FOCI emanates that the parent firm has been cleared to the necessary level under that government's security laws and procedures. Since clearance action in such cases rely, in part, on the investigative and clearance procedures of the other signatory government, such reciprocal agreements are negotiated only with countries whose security laws and procedures are substantially equivalent to those of the United States. If a facility is to be processed for a Reciprocal Facility Security Clearance, the procedures outlined in paragraph 2-117 shall be followed. A Reciprocal Facility Security Clearance

may be granted upon satisfaction of the following criteria and conditions:

(1) There is a Reciprocal Industrial Security Agreement with the foreign government concerned;

(2) A foreign business entity enjoys majority or controlling ownership of the U.S. firm;

(3) The facility does not require access to classified information which is not releasable to the foreign government from which the ownership stems.

e. Special Security Agreement.

(1) This arrangement may be considered for use in instances when the foreign interest owns a majority of the voting securities of a U.S. firm or, if less than majority owned, such stockholdings are sufficient to reasonably conclude that the foreign shareholder(s) or his representative(s) is in a position to effectively control or have the dominant influence over the business management of the U.S. firm, and the foreign shareholder(s) elects to retain control or dominance of operations and management.

(2) Eligibility for processing under this paragraph also requires a User Agency or OSD determination that issuance of a facility security clearance will serve the national interest. Such determinations shall be forwarded to the Deputy Under Secretary of Defense for Policy (DUSD(P)), ATTN; Director, Security Plans and Programs, Pentagon, Washington, D.C. 20301 for confirmation in coordination with appropriate OSD staff elements. Following confirmation of national interest considerations and coordination with non-DoD departments or agencies,

as appropriate, DUSD(P) will direct DIS to initiate development of a Special Security Agreement and inform DIS regarding any prohibited categories of classified information (see paragraph 2-117a), access to which is not required by the U.S. firm, and which will not be authorized for release after issuance of the facility security clearance. Categories of such information not approved for release, if any, shall be reflected on DIS Form 553, FL-381-R, and DISCO Form 560.

(3) The Special Security Agreement concept may be considered as a fully acceptable alternative to Voting Trust or Proxy Agreement arrangements, provided the ownership stems from a country in which the U.S. has entered into a formal Reciprocal Security Agreement and all personnel required to be cleared in connection with the facility security clearance are U.S. citizens, except that the facility shall normally be ineligible for a Top Secret facility security clearance. This arrangement may also be considered when the ownership stems from countries in which the U.S. has not entered into formal reciprocal arrangements, provided a General Security of Information Agreement (GSOIA) or other similar bilateral security agreement exists with the country concerned, all personnel required to be cleared in connection with the facility security clearance are U.S. citizens, and the facility security clearance is limited to the Confidential level.

(4) This agreement will ordinarily include annual FOCI meetings with the principals, Visitation Agreements (appropriately modified), assignment of specific security duties and responsibilities to Board members, formulation of special executive-level security committees to consider and oversee classified matters, and the execution of any board resolutions deemed necessary. A facility under FOCI may be granted a facility security clearance under this arrangement only when the terms and conditions of the Special Security Agreement, in conjunction with ISM requirements, are determined to reasonably and effectively preclude the unauthorized disclosure of classified information to foreign interests. The measures taken to accomplish necessary security safeguards will depend upon the nature and extent of FOCI in each particular case. Accordingly, each such Special Security Agreement is considered unique and its contents must be developed and tailored on a case-by-case basis, wholly dependent on the facts and circumstances present in each instance. The Special Security Agreement shall generally prescribe responsibilities, obligations, limitations and other security safeguards and mechanisms concerning personal, physical and organizational aspects deemed necessary by the parties to the Agreement. The U.S. firm, the foreign interest(s) and the DoD shall be parties to the Agreement.

(5) The granting of a facility security clearance under this arrangement, or any request for an exception to the policy prescribed herein, requires the approval of the DUSD(P).

2-206 Visitation Agreements. In every case where a Voting Trust Agreement, Proxy Agreement or Special Security Agreement is employed to eliminate risks associated with foreign ownership, a Visitation Agreement shall be executed between the facility, the foreign interest, the cognizant security office, and as appropriate, Trustees, Proxy Holders or other designated individuals, hereinafter referred to collectively as Trustees. Visitation Agreements must identify who may visit, for what purposes, when advance approval is necessary and the approval authority. The Trustees shall have approval authority. The facility shall submit individual requests to the approval authority for each visit. The Visitation Agreement shall provide that, as a general rule, visits between the foreign stockholder and the cleared U.S. firm are not authorized; however as an exception to the general rule, the Trustees, may approve such visits in connection with regular day-to-day business operations pertaining strictly to purely commercial products or services and not involving classified contracts.

2-207 Certification and Compliance.

At the inception of any method, agreement or similar arrangement entered into pursuant to paragraph 2-205 above, and at least once each year thereafter, representatives of the cognizant security office, DIS HQ, the Trustees, Proxy Holders, facility management or, as appropriate, other designated individuals, and if requested, the foreign interest(s), will meet to review the purpose of the

pertinent arrangement and to establish common understanding of the operating requirements and how they will be implemented within the firm. These FOCI reviews will be expressly aimed at insuring compliance with all board resolutions, special controls, practices and procedures established to insulate the facility from the foreign interest generally, and to discuss matters pertaining to the compliance or acts of non-compliance with the terms of Voting Trust, Proxy or Special Security Agreements specifically. These reviews also provide the opportunity for DIS to furnish the principals with any necessary guidance or assistance regarding problems or impediments associated with the practical application or utility of the approved arrangement, e.g., foreign disclosure determination delays, non-acceptance of visit requests, etc. In addition, at the end of each year of operation, the Trustees, Proxy Holders or other principals, as appropriate, shall submit to the cognizant security office an annual implementation and compliance report. Any indication of noncompliance must be explained, in writing, by the firm for evaluation by the cognizant security office. Failure on the part of the U.S. firm to assure compliance with the terms of the applicable arrangement in the best interests of the U.S. Government, may constitute grounds for termination of the Department of Defense Security Agreement (DD Form 441) and revocation of the facility security clearance.

2-208 Effects of This Part on Prior Facility Security Clearances.

U.S. firms granted facility security clearances under previous policy shall not be affected by this Part. Such firms may, as appropriate, however, request modification of existing arrangements in accordance with this Part.